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Financial Disclosures and Fist-Fighting: Disorderly Behavior in the South Carolina General Assembly

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**FINANCIAL DISCLOSURES AND FIST-FIGHTING:
“DISORDERLY BEHAVIOR” IN THE SOUTH CAROLINA GENERAL ASSEMBLY**

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I. INTRODUCTION	

In 2013, the South Carolina Supreme Court addressed the question of whether the judiciary can exercise jurisdiction over an ethics complaint against a member of the General Assembly.¹ Although the court dismissed the case, holding that the General Assembly has exclusive jurisdiction over such complaints,² the court also brought up the issue of separation of powers.³ The separation of powers discussion—which was arguably necessary to resolve the issues in the case⁴—later sparked a controversy over the South Carolina State Ethics Commission (State Ethics Commission or Ethics Commission), an entity independent of the General Assembly that has jurisdiction over members of the General Assembly in the same types of ethics complaints.⁵

Currently, the State Ethics Commission has no jurisdiction over the General Assembly.⁶ As of 2012, more than twenty years had passed since the South

1. See *Rainey v. Haley*, 404 S.C. 320, 325, 745 S.E.2d 81, 83 (2013).

2. *Id.*

3. *Id.* at 327, 745 S.E.2d at 84.

4. See Cindy Scoppe, *What Rainey v. Haley Tells Us About Ethics Reform*, THE STATE, June 18, 2013, at A9, available at <http://www.thestate.com/2013/06/18/2823361/scoppe-what-rainey-v-haley-tells.html> (stating that the justices “gratuitously invoke[d] the constitution”).

5. See Adam Beam, *State House for Sale: SC Ethics Laws a Muddled Mess*, THE STATE, Oct. 6, 2013, at B1, available at <http://www.thestate.com/2013/10/06/3021740/exclusive-sc-ethics-law-a-muddled.html>.

6. South Carolina is one of only six states in which the state ethics commission has no jurisdiction over the state legislature. See S.C. CODE ANN. § 8-13-320 (Supp. 2013); IND. CODE

Carolina General Assembly addressed comprehensive ethics reform.⁷ In response to this inaction, Governor Nikki Haley issued Executive Order 2012-09, creating the South Carolina Commission on Ethics Reform (the Reform Commission) on October 18, 2012.⁸ The purpose of the Reform Commission was, and still is, to restore South Carolinians' "confidence in, and respect for, their institutions, including [the] government at all levels."⁹ To that end, one of the Reform Commission's major recommendations focused on independent oversight of ethics law.¹⁰ An independent ethics commission that oversees the South Carolina General Assembly would be better equipped to prevent "self-policing" than ethics committees consisting entirely of legislator-members.¹¹ Further, an independent oversight commission would bring South Carolina in line with thirty-three other states in the Union.¹²

This Note examines the current ethical oversight procedures in South Carolina government and the constitutional implications arising from such procedures. Specifically, Part II examines South Carolina's statutorily created State Ethics Commission and House and Senate Ethics Committees, as well as

ANN. § 4-2-6-2.5 (LexisNexis 2013); IOWA CODE ANN. § 68B.32A (West 2012); MICH. COMP. LAWS ANN. § 15.345 (West 2004); OHIO REV. CODE ANN. § 102.06 (LexisNexis 2007); WASH. REV. CODE ANN. § 42.17A.110 (West 2012). *But see* ALA. CODE § 36-25-4 (LexisNexis 2013); ALASKA STAT. ANN. §§ 15.13.020, .045 (2012); ARK. CODE ANN. § 7-6-217 (2011); CAL. GOV'T CODE § 83115 (West 2005); COLO. CONST. art. XXIX, § 5; CONN. GEN. STAT. ANN. § 1-82 (West 2007); DEL. CODE ANN. tit. 29, § 5809 (2003); FLA. STAT. ANN. § 112.322 (West 2008); GA. CODE ANN. § 21-5-6 (2008); HAW. REV. STAT. ANN. § 84-31 (LexisNexis 2012); 5 ILL. COMP. STAT. 430/25-15 (2013); KAN. STAT. ANN. § 25-4119a-4119b (2000); KY. REV. STAT. ANN. § 6.666 (LexisNexis 2013); LA. REV. STAT. ANN. § 42:1134 (West 2006); ME. REV. STAT. ANN. tit. 1, § 1008 (West 1999); MD. CODE ANN., STATE GOV'T § 15-205 (LexisNexis 2009); MASS. GEN. LAWS ANN. ch. 268B, § 3 (West 2008); MINN. STAT. ANN. § 10A.02 (West 2005); MISS. CODE ANN. § 25-4-21 (2010); MO. ANN. STAT. § 105.955 (West 1997) (*invalidated by* *Legends Bank v. State*, 361 S.W.3d 383 (Mo. 2012) (en banc)); MONT. CODE ANN. § 13-37-111 (West 2013); NEB. REV. STAT. § 49-14, 126 (2010); NEV. REV. STAT. ANN. § 281A.280 (LexisNexis 2013); N.J. STAT. ANN. § 52:13D-21(f) (WEST 2009); N.H. REV. STAT. ANN. § 14-B:3 (2009); N.Y. LEGIS. LAW § 80 (McKinney 1991); N.C. GEN. STAT. § 138A-10 (2013); OKLA. CONST. art. XXIX; OR. REV. STAT. ANN. § 244.270 (2011); 65 PA. CONS. STAT. ANN. § 1107 (West 2010); R.I. CONST. art. III, § 8; TENN. CODE ANN. § 3-6-105 (Supp. 2013); TEX. GOV'T CODE ANN. § 571.061 (West 2012); UTAH JOINT LEG. R. 6-2-202 (2013); W. VA. CODE ANN. § 6B-2-2 (LexisNexis 2010); WIS. STAT. ANN. § 19.48 (2012), 2007 WIS. ACT 1. The following states, on the other hand, do not have a state ethics commission: Arizona, Idaho, New Hampshire, New Mexico, North Dakota, South Dakota, Vermont, Virginia, and Wyoming. *See generally Ethics: State Ethics Commissions*, NAT'L CONF. OF ST. LEGISLATORS, <http://www.ncsl.org/legislatures-elections/ethics/home/state-ethics-commissions.aspx#ethics> (last visited Mar. 31, 2014) (diagramming the current status of the state ethics commissions in all fifty states, but failing to note the statutes that convey jurisdiction).

7. S.C. COMM'N ON ETHICS REFORM, FINAL REPORT 1, 2 (Jan. 28, 2013), <http://www.governor.sc.gov/Documents/SC%20Commission%20on%20Ethics%20Reform%20Final%20Report.pdf> [hereinafter COMMISSION REPORT].

8. *Id.* at 1.

9. *See id.* at 2.

10. *See id.* at 13.

11. *See Scoppe, supra* note 4.

12. *See* COMMISSION REPORT, *supra* note 7, at 13.

their respective statutory schemes for handling ethics complaints under state law. Next, Part III analyzes *Rainey v. Haley*¹³ in detail and discusses the implications of the South Carolina Supreme Court's separation of powers discussion in the opinion.¹⁴ Part IV examines the South Carolina Commission on Ethics Reform and its recent report regarding ethics reform.¹⁵ Part V delves into the separation of powers issue raised by the court in *Rainey*, particularly with respect to the scope of "disorderly behavior"¹⁶—the breadth of which ultimately may resolve the constitutional issue. Part V also looks to national case law for further guidance regarding how to define *disorderly behavior*. Part VI concludes by relating *Rainey* back to the current ethics reform debacle facing the General Assembly, particularly focusing on the goal of creating a more independent form of ethical oversight. Further, Part VI recommends a possible method of creating such independent ethics oversight without violating the constitutional limits outlined in *Rainey*.

II. BACKGROUND ON ETHICAL OVERSIGHT IN THE SOUTH CAROLINA GENERAL ASSEMBLY

It is important to distinguish between an ethics commission and an ethics committee.¹⁷ Simply put, an ethics commission is generally more independent of the legislature than an ethics committee.¹⁸ A commission's members are typically citizens or public officials from the executive branch appointed by the governor or other leaders, whereas a committee is made up of state legislators.¹⁹ Thus, a commission offers relatively independent external oversight compared to a committee's internal oversight—which entails members overseeing their peers and ensuring that they comply with ethics laws.²⁰ An ethics commission is usually classified as part of the executive branch, while a committee is clearly part of the legislative branch.²¹ Further, while a committee only has jurisdiction over legislative bodies, a commission's jurisdiction usually reaches other branches of the government—sometimes extending from the executive branch to the legislature.²² All fifty states have some form of an ethics committee,²³ whereas only forty-one states have some form of an ethics commission.²⁴

13. 404 S.C. 320, 745 S.E.2d 81 (2013).

14. *Id.* at 326–27, 745 S.E.2d at 84.

15. *See* COMMISSION REPORT, *supra* note 7, at 1.

16. S.C. CONST. art. III, § 12.

17. *See Ethics Committees and Ethics Commissions: What's the Difference?*, NAT'L CONF. OF ST. LEGISLATURES, <https://www.ncsl.org/legislatures-elections/ethics/home/committees-and-commissions-whats-the-difference.aspx> (last visited Mar. 31, 2014).

18. *See id.*

19. *See id.*

20. *See id.*

21. *Id.*

22. *Id.*

When the State Ethics Commission was created in 1975, it was responsible for financial disclosure, campaign procedure, and ethical rules of conduct pertaining to public officials.²⁵ At that time, the commission could publish advisory opinions, receive ethics complaints, and conduct investigations and hearings in response to those complaints.²⁶ However, after years of little change, and in response to the indictment of seventeen lawmakers on charges of accepting bribes,²⁷ the General Assembly enacted the Ethics, Government Accountability, and Campaign Reform Act of 1991 (the State Ethics Act)²⁸ to restore public trust in governmental institutions and the political process.²⁹ The State Ethics Act increased the statutory penalties and expanded the size and responsibilities of the Ethics Commission to include lobbyist registration and disclosure.³⁰

Currently, the State Ethics Commission exists in addition to separate House and Senate Ethics Committees that provide ethical oversight to their respective bodies of the General Assembly.³¹ As such, the Ethics Commission has no jurisdiction over the members or staff of the General Assembly; rather, it only has jurisdiction over public officials, public members, or public employees—primarily of the executive branch.³² The policy behind this separation appears to

23. *Id.* South Carolina has both a House Ethics Committee and a Senate Ethics Committee. S.C. CODE ANN. § 8-13-510 (Supp. 2013).

24. *Id.*

25. *About Us*, S.C. ST. ETHICS COMMISSION, SC.GOV, <http://ethics.sc.gov/AboutUs/Pages/index.aspx> (last visited June 13, 2014).

26. *Id.*

27. *See* Beam, *supra* note 5.

28. S.C. CODE ANN. §§ 8-13-100 to -1520 (Supp. 2013).

29. *See Guide to the South Carolina State Ethics Act*, SPARTANBURG CMTY. COLL., http://ww2.sccsc.edu/SACS/reference/WebPages/EthicsGuide_208-8-03.pdf (last updated Aug., 2003); Beam, *supra* note 5.

30. S.C. ST. ETHICS COMMISSION, *supra* note 25; *see also* Vordman Carlisle Traywick, III, Note, *The South Carolina Primary Debacle: The Impact of Anderson v. South Carolina State Election Commission and Vague State Election Laws on the 2012 Election*, 64 S.C. L. REV. 931, 934–36 (2013) (outlining the ethics filing and disclosure requirements under the State Ethics Act).

31. S.C. CODE ANN. §§ 8-13-310, -510 (Supp. 2013).

32. The State Ethics Commission's jurisdiction is as follows:

[T]o initiate or receive complaints and make investigations . . . upon complaint by an individual, of an alleged violation of this chapter or Chapter 17 of Title 2 by a public official, public member, or public employee except members or staff, including staff elected to serve as officers of or candidates for the General Assembly unless otherwise provided for under House or Senate rules.

S.C. CODE ANN. § 8-13-320(9) (Supp. 2013). A *public employee* is “a person employed by the State, a county, a municipality, or a political subdivision thereof.” *Id.* § 8-13-100(25). *Public member* describes “an individual appointed to a noncompensated part-time position on a board, commission, or council.” *Id.* § 8-13-100(26). A public member does not lose this status by receiving reimbursement of expenses or a per diem payment for services.” *Id.* *Public official* is defined as follows:

[A]n elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for the office. “Public official” does not mean a member of the judiciary except that for the purposes of campaign practices, campaign

stem from article III, section 12 of the South Carolina constitution, which states that “[e]ach house shall . . . punish its members for disorderly behavior”³³ This provision has bolstered the argument that the state constitution requires legislative self-policing and, to date, has provided a legal basis for the continued separation of the Ethics Commission and legislative committees.³⁴ To that end, “Courts have upheld state legislatures’ right to set and impose their own ethical rules, usually based on a separation of powers ruling.”³⁵

The State Ethics Commission is composed of nine members appointed by the Governor, upon the advice and consent of the General Assembly, on which one member represents each of the seven congressional districts and two members are appointed from the state at large.³⁶ Members serve five-year terms.³⁷ The Ethics Commission is considered an administrative agency under the executive branch of government.³⁸ Members of the General Assembly and other public officials are not eligible to serve on the commission.³⁹ In comparison, the House and Senate Ethics Committees are each made up of six members who are elected by the House and Senate, respectively.⁴⁰ The committees’ members serve terms that are coterminous with their terms in the House or Senate.⁴¹

The current mission statement for the State Ethics Commission highlights its responsibility for enforcing the State Ethics Act and “restoring public trust in government.”⁴² The Ethics Commission carries out this policy by ensuring compliance with the requirements of the State Ethics Act.⁴³ Nevertheless, the main distinction between the Ethics Commission and the House and Senate

disclosure, and disclosure of economic interests, a probate judge is considered a public official and must meet the requirements of this chapter.

Id. § 8-13-100(27).

33. S.C. CONST. art. III, § 12.

34. *See* Beam, *supra* note 5.

35. *Ethics Committees & Commissions*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/ethics/ethics-committees-commissions.aspx> (last visited Mar. 5, 2014). This Note does not delve into the debate regarding whether courts have jurisdiction over legislative ethical violations; rather, this Note discusses the constitutionality of an independent ethics commission exercising jurisdiction over the General Assembly.

36. S.C. CODE ANN. § 8-13-310(B) (Supp. 2013).

37. *Id.* § 8-13-310(C).

38. *See Ethics: State Ethics Commissions, South Carolina*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/ethics/state-ethics-commissions.aspx> (last visited Mar. 5, 2014).

39. S.C. CODE ANN. § 8-13-310(B) (Supp. 2013).

40. *Id.* § 8-13-510.

41. *Id.*

42. *Agency Mission Statement*, S.C. ST. ETHICS COMMISSION, <http://ethics.sc.gov/AboutUs/Pages/Commission.aspx#agencymission> (last visited Mar. 5, 2014).

43. *Id.*

Ethics Committees concerns which public officials fall within their respective statutory jurisdictions.⁴⁴

A. The Statutory Process for Handling an Ethics Complaint

Under the State Ethics Act, the process by which the State Ethics Commission conducts its investigations, inquiries, and hearings begins with the commission accepting a verified complaint, in writing, that states the name of the person alleged to have committed a violation and the particulars of that violation.⁴⁵ Additionally, if the commission receives any information and finds probable cause to believe that a violation has otherwise occurred, the commission can file a verified complaint itself.⁴⁶ Next, if the commission determines that a complaint fails to allege sufficient facts to constitute a violation, the commission will dismiss the complaint and strike it from public record.⁴⁷ If the facts are sufficient, however, the commission will conduct an investigation.⁴⁸ The commission must order testimony and subpoena any witnesses or materials evidencing proof of the alleged violation.⁴⁹ Unless the respondent waives the right to confidentiality, all investigations, inquiries, hearings, and accompanying documents must remain confidential until a finding of probable cause or dismissal.⁵⁰ Additionally, the Ethics Commission must afford the subject of a complaint the opportunity to be heard and all other due process rights.⁵¹ After the investigation, the commission must determine whether probable cause exists.⁵² If so, the commission may order a hearing before a “panel of three commissioners, selected at random, to determine whether a violation . . . has actually occurred”; if not, the commission will dismiss the complaint.⁵³ Within sixty days of the conclusion of a hearing, the panel must issue its determination in a “written decision with findings of fact and conclusions of law.”⁵⁴ The written decision may set forth an order requiring (1)

44. Compare S.C. CODE ANN. § 8-13-320(9) (listing public official, public member, or public employee except members or staff, including staff elected to serve as officers of or candidates for the General Assembly, unless otherwise provided for under House or Senate rules, as those subject to complaint investigation), with *id.* § 8-13-530 (listing members, staff, and candidates as subject to complaint investigation).

45. *Id.* § 8-13-320(10)(a).

46. *Id.* § 8-13-320(10)(d). This type of verified complaint is filed upon a motion and affirmative vote of the majority of the total membership of the commission. *Id.*

47. *Id.* § 8-13-320(10)(b). The executive director of the commission can also make this determination. *Id.*

48. *Id.* § 8-13-320(10)(c). The commission can request assistance from the appropriate agencies if needed. *Id.* § 8-13-320(10)(e).

49. *Id.* § 8-13-320(10)(f).

50. *Id.* § 8-13-320(10)(g).

51. *Id.* § 8-13-320(10)(h). This includes the right to counsel. *Id.*

52. *Id.* § 8-13-320(10)(i).

53. *Id.*

54. *Id.* § 8-13-320(10)(k).

the payment of a civil penalty; (2) the “forfeiture of gifts, receipts or profits, or the value thereof, obtained” in the violation; or (3) some combination of the two.⁵⁵ Additionally, section 8-13-320(10)(k) outlines other actions the commission may take with respect to its decision:

The commission panel, where appropriate, shall recommend disciplinary or administrative action, or in the case of an alleged criminal violation, refer the matter to the Attorney General for appropriate action. The Attorney General may seek injunctive relief or may take other appropriate action as necessary. In the case of a public employee, the commission panel shall file a report to the administrative department executive responsible for the activities of the employee. If the complaint is filed against an administrative department executive, the commission panel shall refer the case to the Governor.⁵⁶

An appeal process, during which the full commission reviews the decision made by the panel, is also available so long as the respondent appeals within ten days after service of an order, report, or recommendation.⁵⁷ Lastly, all actions taken by the commission after a decision is rendered are matters of public record.⁵⁸

The legislative committees follow a similar process, albeit more statutorily simplified. When a complaint is filed, the respective committee determines whether the facts are sufficient to constitute a violation.⁵⁹ If so, the committee promptly conducts a confidential investigation of the alleged violation in which the committee may subpoena the attendance and testimony of witnesses, as well as the production of pertinent documents.⁶⁰ If probable cause exists to support an alleged violation, the committee may “render an advisory opinion to the respondent” that requires compliance.⁶¹ Should the respondent fail to comply with the advisory opinion, the committee may convene a formal hearing on the matter within thirty days.⁶² After the hearing, the committee makes a finding of fact.⁶³ If “competent and substantial evidence” warrants, the committee may

55. *Id.* § 8-13-320(10)(l).

56. *Id.* § 8-13-320(10)(k).

57. *Id.* § 8-13-320(10)(m).

58. *Id.* § 8-13-320(10)(o).

59. *Id.* § 8-13-540(1).

60. *Id.* These actions are very similar to those of the Ethics Commission. *Compare id.* § 8-13-540(1) (providing that a sufficiently pled violation mandates prompt investigation with possible subpoenas of witness and documents), *with id.* § 8-13-320(10)(c)–(h) (providing that a sufficiently pled violation permits an investigation with possible subpoenas of witnesses and documents).

61. *Id.* § 8-13-540(1)(a).

62. *Id.* § 8-13-540(1)(b). If a hearing is set, the respondent has access to all of the documents and matters procured by the committee and must be afforded all appropriate due process protections. *Id.* § 8-13-540(2).

63. *Id.* § 8-13-540(3).

take any combination of the following four actions: “administer a public or private reprimand,” determine that a “technical violation” has occurred,⁶⁴ “recommend expulsion of the member,” or refer the matter to the state attorney general in the case of an alleged criminal violation.⁶⁵ Following the committee’s order, the respondent has ten days to appeal the action to the full legislative body.⁶⁶ If the respondent appeals, the committee may only *recommend* an action to the full legislative body.⁶⁷ In these situations, the House or Senate has the power to sustain or overrule the ethics committee’s ruling or order other actions consistent with the State Ethics Act.⁶⁸ Accordingly, the respective legislative body maintains final say over any ethical matter concerning its own members.⁶⁹

III. *RAINEY V. HALEY* AND THE SEPARATION OF POWERS ISSUE

Lawmakers have cited *Rainey v. Haley* to support the proposition that the creation of a single ethics commission—independent of the General Assembly—to oversee all public officials would violate the separation of powers doctrine in the South Carolina constitution.⁷⁰ This Part first covers the facts leading up to the South Carolina Supreme Court hearing the *Rainey v. Haley* case and then analyzes the court’s opinion in depth.

A. *Facts Leading to the South Carolina Supreme Court Hearing Rainey v. Haley*

The controversy involving John Rainey⁷¹ and Governor Nikki Haley began on November 17, 2011, when Rainey—acting simply as a private citizen—filed a complaint in the Richland County Court of Common Pleas seeking a declaratory judgment that Haley violated certain provisions of the State Ethics Act while serving in the South Carolina House of Representatives.⁷² Specifically, the complaint asked for a declaration regarding whether Haley violated the law by committing the following actions:

64. A technical violation is typically unintentional and not made in an effort to violate the Ethics Act. *Id.* § 8-13-1170. Technical violations must remain confidential unless the respondent requests otherwise; they are penalized by a fine not exceeding fifty dollars. *Id.*

65. *Id.* § 8-13-540(3).

66. *Id.* § 8-13-540(4).

67. *See id.* § 8-13-550(A).

68. *Id.*

69. *See id.*; *see also* Scoppe, *supra* note 4 (discussing “self-policing” policies in the General Assembly’s ethics oversight).

70. *See* Beam, *supra* note 5.

71. Rainey is a citizen of and practicing attorney in South Carolina. *John Rainey*, PALMETTO INST., <http://www.palmettoinstitute.org/johnrainey.aspx> (last visited Mar. 15, 2014).

72. Brief of Appellant at 6, *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013) (No. 2011-CP-40-7854), 2012 WL 7677707, at *6.

(1) lobbying a state agency in violation of S.C. Code Ann. § 2-17-15(A) (Supp. 2011); (2) failing to disclose that her reason for recusing herself from voting on legislation was because the legislation's beneficiary was secretly paying her, in violation of S.C. Code Ann. § 8-13-700(B) (Supp. 2010); (3) failing to abstain from a vote authorizing payment of public money to a corporation paying her, in violation of S.C. Code Ann. § 8-13-700(A) (Supp. 2010); (4) soliciting money from registered lobbyists and lobbyists' principals for the benefit of her employer, in violation of the same code section; and (5) concealing all of this activity by making false and incomplete public disclosures required by the Ethics Act, in violation of S.C. Code Ann. § 16-9-10(A)(2) (Supp. 2011).⁷³

On March 21, 2012, the circuit court dismissed the action, finding that the court lacked subject matter jurisdiction and that Rainey lacked standing.⁷⁴

Rainey, in line with the State Ethics Act, also filed the same complaint with the House Ethics Committee two days before the circuit court dismissed the case.⁷⁵ In early May of 2012, several weeks after the circuit court's dismissal, the House Ethics Committee—in line with the procedure outlined in section 8-13-540—found the allegations sufficient to warrant an investigation, but then voted along party lines to clear Haley of the charges.⁷⁶ After House Democrats objected to the committee's contradictory outcome, however, the committee reversed course and proceeded to hold a full hearing on the merits.⁷⁷ Nevertheless, after the hearing, the House Ethics Committee held that "Governor Haley had not violated the law" and finalized the dismissal of Rainey's claims.⁷⁸ Subsequent to this jurisdictional ping-pong between the judiciary and General Assembly, Rainey appealed the circuit court's decision and the South Carolina Supreme Court agreed to hear the appeal.⁷⁹

73. *Id.* The complaint also noted that the 2011 amendment to South Carolina Code section 8-13-700(B) "does not apply to the allegations" in the case. *Id.* at 6 n.1.

74. *See id.* at 7.

75. Return Brief of Respondent at 2, *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013) (No. 2011-CP-40-7854), 2012 WL 7677708, at *2.

76. Gina Smith, *Reignited Haley Ethics Probe Grabs Spotlight*, THE STATE, May 27, 2012, at A3, available at <http://www.thestate.com/2012/05/27/2291742/reignited-haley-ethics-probe-grabs.html>. Five Republicans voted to clear Haley—also a Republican—of the charges, while one Democrat voted against clearing Haley of the charges. *See id.*

77. *Id.*

78. Return Brief of Respondent, *supra* note 75.

79. *See Rainey v. Haley*, 404 S.C. 320, 322–23, 745 S.E.2d 81, 82 (2013). Thus, the case moved back to the judicial branch. *Id.*

B. The Real Issue(s) in Rainey v. Haley and the Court's Decision

The two issues on appeal were clearly stated in both Rainey's and Haley's briefs to the supreme court: (1) whether *courts* in South Carolina have jurisdiction to render declaratory judgments regarding the regulated conduct of a member of the General Assembly who violates the law under the State Ethics Act; and (2) whether a private citizen has standing to seek declaratory relief in regard to the questionable ethical actions of the same member.⁸⁰ Rainey also claimed that an answer to the second issue would "provide future guidance in a matter of great public importance[.]"⁸¹ The factual merits of the case were clearly not on appeal, however, because the circuit court never reached them.⁸² Additionally, the original briefs did not even mention the constitutional issue of whether the court was violating separation of powers principles by hearing the case.⁸³

The supreme court began its opinion by addressing the first issue—whether the court had jurisdiction to hear Rainey's case.⁸⁴ Looking to the "plain and unambiguous"⁸⁵ language of the State Ethics Act, the court held that "[t]he [General Assembly] has established a comprehensive statutory scheme for regulating the behavior of elected officials, public employees, lobbyists, and other individuals who present for public service."⁸⁶ To that end, the State Ethics Commission and the Senate and House Ethics Committees were statutorily created to enforce the Act.⁸⁷ Additionally, the court looked to legislative intent to determine "whether the [General Assembly] has given another entity [besides the courts] exclusive jurisdiction . . ."⁸⁸ In that regard, "the relevant statute" determines where jurisdiction lies.⁸⁹ The court concluded that, under the State Ethics Act, the General Assembly had conveyed exclusive jurisdiction upon the House and Senate Ethics Committees "for the handling of ethics complaints involving members of the General Assembly and their staff."⁹⁰ Furthermore, for the court to exercise jurisdiction otherwise would "contravene the clear language of the State Ethics Act."⁹¹

80. Brief of Appellant, *supra* note 72, at 5; Return Brief of Respondent, *supra* note 75, at 1.

81. Brief of Appellant, *supra* note 72, at 5.

82. See *Rainey*, 404 S.C. at 322–23, 745 S.E.2d at 82.

83. See generally Brief of Appellant, *supra* note 72 (failing to mention separation of powers); Return Brief of Respondent, *supra* note 75 (failing to mention separation of powers).

84. *Rainey*, 404 S.C. at 323, 745 S.E.2d at 82.

85. *Id.* (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

86. *Id.* at 323–24, 745 S.E.2d at 83.

87. *Id.* at 324, 745 S.E.2d at 83.

88. *Id.* at 323, 745 S.E.2d at 83 (quoting *Dema v. Tenet Physician Servs.–Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009)).

89. *Id.*

90. *Id.* at 324, 745 S.E.2d at 83. On the other hand, "[T]he State Ethics Commission is generally responsible for the handling of ethical violations by most public officials and employees . . ." *Id.*

91. *Id.* at 327, 745 S.E.2d at 84.

The supreme court continued its discussion of legislative intent and fortified its position by citing the rule of construction “*expressio unius est exclusio alterius*,” or “to express or include one thing implies the exclusion of another, or of the alternative.”⁹² To that end, the court pointed to the single exception within the State Ethics Act under which the judiciary has jurisdiction and “the circuit court may receive and act on an ethics complaint, to the exclusion of the Ethics Committee.”⁹³ Because this is the only exception under the Act, the court repeated its holding: “It is therefore clear the [General Assembly] intended the respective Ethics Committee to otherwise have exclusive authority to hear alleged ethics violations of its own members and staff.”⁹⁴

While the supreme court could have concluded its opinion with this subpart, the court instead included a paragraph of dicta discussing separation of powers and a constitutional issue.⁹⁵ Specifically, the court began by acknowledging South Carolina’s constitutional and judicial recognition and respect for the General Assembly’s authority over the conduct of its own members.⁹⁶ The court supported this sentence by citing article III, sections 11 and 12 of the South Carolina constitution.⁹⁷ Section 11 grants each legislative house the authority to judge the election returns and qualifications of its own members,⁹⁸ while section 12 provides that “[e]ach house shall choose its own officers, determine its rules of procedure, *punish its members for disorderly behavior*, and, with the concurrence of two-thirds, expel a member, but not a second time for the same cause.”⁹⁹ Further, the supreme court cited two cases in which it had interpreted only section 11 and held that that provision barred its jurisdiction.¹⁰⁰ The court,

92. See *id.* at 325, 745 S.E.2d at 84 (quoting *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000)) (internal quotation marks omitted).

93. *Id.* at 325, 745 S.E.2d at 83–84 (citing S.C. CODE ANN. § 8-13-530(4) (Supp. 2013)). The exception has been dubbed the “fifty-day period” exception and provides the following:

No complaint may be accepted by the ethics committee concerning a member of or candidate for the appropriate house during the fifty-day period before an election in which the member or candidate is a candidate. During this fifty-day period, any person may petition the court of common pleas alleging the violations complained of and praying for appropriate relief by way of mandamus or injunction, or both. Within ten days, a rule to show cause hearing must be held, and the court must either dismiss the petition or direct that a mandamus order or an injunction, or both, be issued. A violation of this chapter by a candidate during this fifty-day period must be considered to be an irreparable injury for which no adequate remedy at law exists.

S.C. CODE ANN. § 8-13-530(4) (Supp. 2013).

94. *Rainey*, 404 S.C. at 325–26, 745 S.E.2d at 84.

95. *Id.* at 326–27, 745 S.E.2d at 84–85. This paragraph sparked controversy in later legislative discussions regarding the creation of a single ethics commission. See Beam, *supra* note 5.

96. *Rainey*, 404 S.C. at 326, 745 S.E.2d at 84.

97. *Id.* (citing S.C. CONST. art. III, §§ 11, 12).

98. S.C. CONST. art. III, § 11.

99. *Id.* § 12 (emphasis added).

100. *Rainey*, 404 S.C. at 326–27, 745 S.E.2d at 84 (citing *Stone v. Leatherman*, 343 S.C. 484, 541 S.E.2d 241 (2001); *Scott v. Thornton*, 234 S.C. 19, 106 S.E.2d 446 (1959)).

however, did not provide a citation to a case in which it had interpreted section 12.¹⁰¹ The supreme court then concluded that “[c]onsequently, a court’s exercise of jurisdiction over [Rainey’s] ethical complaint against Governor Haley would not only contravene the clear language of the State Ethics Act, it would also violate separation of powers.”¹⁰² This sentence was at the heart of the controversy in later legislative discussions and is the focal point of this Note.¹⁰³

In *Rainey*, the supreme court seemed to divide the statutory scheme for handling ethics violations into three distinct steps: (1) receiving the complaint, (2) handling and investigating the complaint under the statutory process, and (3) resolving the complaint.¹⁰⁴ While these three steps appear to delineate certain jurisdictional boundaries, the question becomes where to draw the line to avoid violating separation of powers.¹⁰⁵ The court looked to article III, section 12 in an attempt to find constitutional guidance as to what powers are reserved for the General Assembly.¹⁰⁶ The court appeared to interpret the language pertaining to the ability to “punish its members for disorderly behavior” to include ethical violations under the provisions of the State Ethics Act.¹⁰⁷ The power to “punish” appears to be synonymous with the court’s third step of its delineation—the actual resolution of an ethics complaint.¹⁰⁸ That being said, the court arguably drew a line between the second step of handling a complaint and the third step of resolving a complaint.¹⁰⁹ Thus, under *Rainey*, to give any entity besides the House or Senate Ethics Committee the power to punish legislative members for ethics violations would violate the South Carolina constitution’s separation of powers doctrine by depriving the General Assembly of its right to “punish its members for disorderly behavior.”¹¹⁰

IV. THE SOUTH CAROLINA COMMISSION ON ETHICS REFORM

Prior to the outcome of *Rainey v. Haley*, Governor Haley issued an Executive Order in October of 2012 creating the South Carolina Commission on Ethics Reform.¹¹¹ The Reform Commission published a report that “identifie[d] those areas [in South Carolina ethics laws] which need immediate attention as

101. *See id.* at 326–27, 745 S.E.2d at 84.

102. *Id.* The court also held that, because it lacked jurisdiction to hear the case, it did not need to address the remaining issue on appeal—Rainey’s standing as a private citizen. *See id.* at 327, 745 S.E.2d at 84 n.6.

103. *See Beam, supra* note 5.

104. *See Rainey*, 404 S.C. at 325, 745 S.E.2d at 83.

105. For example, it may be possible for an entity to receive and handle a complaint but not resolve the complaint. *See infra* Part V.

106. *Rainey*, 404 S.C. at 326, 745 S.E.2d at 84.

107. *See id.* at 326–27, 745 S.E.2d at 84 (quoting S.C. CONST. art. III, § 12).

108. *See id.* (quoting S.C. CONST. art. III, § 12).

109. *See infra* Part V.

110. *See Rainey*, 404 S.C. at 326–27, 745 S.E.2d at 84 (quoting S.C. CONST. art. III, § 12).

111. COMMISSION REPORT, *supra* note 7, at 1.

well as some which would stimulate the further examination [sic] of broad categories of needed change.”¹¹² Of particular relevance to this Note is appendix 2, which addressed separation of powers and the State Ethics Commission’s jurisdiction.¹¹³

Appendix 2 began by walking through the statutory provisions pertaining to the State Ethics Commission and the House and Senate Ethics Committees.¹¹⁴ Particularly, it pointed out that the Ethics Commission is the “appropriate supervisory office” for all public officials, “except for those members of or candidates for the office of State Senator or State Representative.”¹¹⁵ The Reform Commission referred to this statutory cutout as the “legislative exception.”¹¹⁶ Later in appendix 2, the Reform Commission noted that “even the section of the code establishing the three ethics bodies indicates that waiver of the legislative exception may be accomplished by House or Senate rule”¹¹⁷ Thus, the Reform Commission appeared to take a less constrictive approach to the statutory scheme of the State Ethics Act than the court in *Rainey v. Haley*.¹¹⁸

Also contrary to the court in *Rainey*, the Reform Commission opined that the South Carolina constitution is silent on the issue of ethics oversight.¹¹⁹ Accordingly, appendix 2 addressed “whether a constitutional change would be necessary to remove the legislative exception to the jurisdiction of the South Carolina Ethics Commission.”¹²⁰ The Reform Commission specifically noted the separation of powers doctrine in article I, section 8 of the South Carolina constitution and the legislative power vested in the Senate and House of Representatives by article III, section 1.¹²¹ The Reform Commission then examined article III, section 12 in conjunction with section 13, while the court in

112. *Id.* at 2.

113. *See id.* at app. 2, at 28.

114. *Id.* at app. 2, at 28 (citing S.C. CODE ANN. §§ 8-13-100(2)(a), -310(A), -320(9), -510, -530(3)).

115. *Id.* (quoting S.C. CODE ANN. § 8-13-100(2)(a)).

116. *See id.* (quoting S.C. CODE ANN. § 8-13-510).

117. *Id.* at app. 2, at 29 (“[T]o initiate or receive complaints and make investigations . . . of an alleged violation . . . by a public official, public member, or public employee except members or staff, including staff elected to serve as officers of or candidates for the General Assembly *unless otherwise provided for under House or Senate rules.*” (citing S.C. CODE ANN. § 8-13-320(9) (emphasis added))).

118. *Compare id.* (interpreting jurisdiction under the State Ethics Act), *with Rainey v. Haley*, 404 S.C. 320, 323–24, 745 S.E.2d 81, 83–84 (2013) (citations omitted) (interpreting jurisdiction under the State Ethics Act).

119. COMMISSION REPORT, *supra* note 7, at 28. On the other hand, the *Rainey* court claimed that *disorderly behavior* umbrellas ethical oversight. *See Rainey*, 404 S.C. at 326–27, 745 S.E.2d at 84.

120. COMMISSION REPORT, *supra* note 7, at 28. The issue is not whether the current language in the South Carolina constitution obstructs jurisdiction, as discussed in *Rainey*. *See Rainey*, 404 S.C. at 326–27, 745 S.E.2d at 84.

121. COMMISSION REPORT, *supra* note 7, at 28–29 (quoting S.C. CONST. art. I, § 8; art. III, § 1).

Rainey v. Haley considered it with section 11.¹²² This reading of the state constitution accounts for the Reform Commission's view that *disorderly behavior* from section 12 relates to the legislative arrest provision in section 13.¹²³ The Reform Commission stated that "[t]he purpose of legislative arrest appears to be to prevent disruption of legislative business."¹²⁴ Thus, by "[r]eading the two sections together, the power to punish both members and non-members appears to be linked to the *actual operation* of the legislative branch."¹²⁵ The Reform Commission adopted a narrow view of *disorderly behavior* coupled with "threats of assault or arrest," referring to them as two of the "only urgent impediments to the smooth functioning of legislative business."¹²⁶ As such, "[n]either punitive section appears to contemplate a role for sanctioning conduct *not immediately threatening* to legislative proceedings."¹²⁷

Lastly, the Reform Commission cited a later section of the South Carolina constitution concerning the actual removal of legislative officers, which states "that legislators shall be removed for incapacity, misconduct or neglect of duty, *in such manner as may be provided by law*, when no mode of trial or removal is provided in this Constitution."¹²⁸ The Reform Commission seemed to include this quotation, and the emphasis within, to show a distinction between conduct immediately threatening to legislative proceedings—as dealt with under sections 12 and 13—and the mode of removal under the State Ethics Act for ethical misconduct, which deals with conduct that is *not* immediately threatening.¹²⁹

The Reform Commission began the conclusion of appendix 2 by pointing out that "[a]ll bodies charged with investigating and punishing unethical conduct by public officials in South Carolina are statutorily created."¹³⁰ Therefore, "If each body in the General Assembly possessed inherent state constitutional authority to investigate and sanction unethical behavior among its members as a consequence of separation of powers and its ability to punish 'disorderly behavior,' [then] statutory provisions for legislative ethics committees would be

122. Compare *id.* at 29 (examining article III, section 12 of the state constitution in conjunction with section 13), with *Rainey*, 404 S.C. at 326, 745 S.E.2d at 84 (examining article III, section 12 of the state constitution in conjunction with section 11). Note that the Reform Commission's report came out prior to *Rainey v. Haley*. Compare COMMISSION REPORT, *supra* note 7, at 2 (noting that the report was released in January of 2013), with *Rainey*, 404 S.C. at 320, 745 S.E.2d at 81 (noting that the case was decided in June of 2013).

123. See COMMISSION REPORT, *supra* note 7, at 29.

124. *Id.*

125. *Id.* (emphasis added).

126. See *id.* (internal quotation marks omitted).

127. *Id.* (emphasis added).

128. *Id.* (quoting S.C. CONST. art. III, § 27) (internal quotation marks omitted).

129. Compare *id.* (discussing the mode of removal when the threat is not immediate), with S.C. CONST. art. III, §§ 12–13 (discussing removal when an immediate threat to legislative proceedings is present).

130. COMMISSION REPORT, *supra* note 7, at 29.

unnecessary.”¹³¹ Because the state’s ethics bodies were created by statute, the General Assembly retains the power to modify the operations of these bodies by amending the relevant sections of the South Carolina Code.¹³² The Reform Commission pointed out that thirty-three of the forty states that have state ethics commissions include their respective state legislatures within the jurisdiction of their respective committees.¹³³ On the other hand, “South Carolina is one of six states that have [sic] not granted this expanded jurisdiction.”¹³⁴ Thus, the Reform Commission concluded that a constitutional amendment would be unnecessary to allow the State Ethics Commission to “subsume the jurisdiction of the Senate and House Legislative Ethics Committees.”¹³⁵ Simply changing the existing statute would be consistent with the legislative power that created the ethical oversight bodies in the first place.¹³⁶ Further, it “would pose no threat to the separation of powers, as the punitive authority vested in the legislature appears to be solely in service of maintaining the *core legislative function*”—which the Reform Commission concluded does not include ethical misconduct.¹³⁷

V. ANALYZING *DISORDERLY BEHAVIOR* AND THE BREADTH OF ITS MEANING

The discrepancy between the supreme court’s analysis in *Rainey* and the Reform Commission’s conclusion in its report appears to turn on the scope of *disorderly behavior*—whether state legislators’ ethical misconduct falls within the exclusivity of article III, section 12 of the South Carolina constitution. While not explicitly stated, both the *Rainey* court and the Reform Commission addressed this issue, but reached their respective conclusions in different manners.¹³⁸ First, the supreme court decided whether the *judiciary* has jurisdiction to hear an ethics complaint under the State Ethics Act.¹³⁹ In

131. *Id.* at 29–30 (quoting S.C. CONST. art III, § 12).

132. *Id.* at 30. The Reform Commission also noted that bills were introduced in both the House and Senate during the 2011–2012 legislative session to expand the jurisdiction of the State Ethics Commission to cover members of the General Assembly; however, neither bill made it out of the committee stage. *Id.* (citing H.B. 4421 (S.C. 2012) and S.B. 1373 (S.C. 2012)).

133. *Id.*

134. *Id.*; see also sources cited *supra* note 6 (depicting which states have ethics commissions and which states have ethics jurisdiction over their respective legislatures).

135. COMMISSION REPORT, *supra* note 7, at 30.

136. *Id.*

137. See *id.* at 29–30 (emphasis added). This conclusion obviously conflicts with the court’s ruling in *Rainey* inasmuch as it deprives the General Assembly of its power to punish its members—but otherwise, it may be possible to grant jurisdiction to another entity to receive and handle ethics complaints. See *infra* Part V.

138. Compare *Rainey v. Haley*, 404 S.C. 320, 325, 745 S.E.2d 81, 84 (2013) (discussing whether the court can hear a legislative member’s ethics violations), with COMMISSION REPORT, *supra* note 2, at 30 (discussing whether the State Ethics Commission has jurisdiction over a legislative member’s nonpunitive violations).

139. *Rainey*, 404 S.C. at 324–25, 745 S.E.2d at 83–84 (citations omitted).

comparison, the Reform Commission considered whether the State Ethics Commission may—independently from the General Assembly—constitutionally exercise jurisdiction over a legislative member's ethics violations under the State Ethics Act.¹⁴⁰ While these may appear to be relatively different analyses, both interpreted article III, section 12—particularly disorderly behavior—to determine proper jurisdiction.¹⁴¹ Thus, these different interpretations raise the obvious questions: What exactly does *disorderly behavior* mean, and does its scope reach legislators' violations under the State Ethics Act?

One of the following three outcomes ultimately results, depending on the scope of *disorderly behavior*:

1. Maintaining the current statutory scheme in the State Ethics Act, under which the House and Senate Ethics Committees handle their respective ethics cases involving members of the General Assembly because such power falls exclusively within their jurisdiction under article III, section 12 of the South Carolina constitution.
2. Drawing a jurisdictional line within the statutory scheme for processing ethics violations between the second step—handling the complaint under the statutory process—and the third step of resolving the complaint and punishing the violator. This outcome preserves all of the current ethics oversight entities, but also allows for more independent ethics oversight. The State Ethics Commission would receive the complaint and handle the resulting investigation and factfinding, while either the House or Senate Ethics Committee would then resolve the complaint and punish its members under article III, section 12.
3. Amending the State Ethics Act to grant the State Ethics Commission full jurisdiction over all public officials, including legislators, because the scope of disorderly conduct does not reach ethics violations and only refers to disruption of legislative business.

Drudging through the following analysis is necessary to understand these possible outcomes. The first two outcomes assume that the scope of *disorderly behavior* includes ethical misconduct under the State Ethics Act. Under that assumption, the South Carolina constitution appears to grant exclusive jurisdiction to the respective legislative bodies and, in turn, their ethics

140. See COMMISSION REPORT, *supra* note 7, at 30.

141. Compare *id.* at 29 (examining article III, section 12 of the state constitution in conjunction with section 13), with *Rainey*, 404 S.C. at 326–27, 745 S.E.2d at 84 (examining article III, section 12 of the state constitution in conjunction with section 11).

committees.¹⁴² This train of thought, however, can reach either of the first two outcomes. Looking back to *Rainey v. Haley*, the court divided the statutory scheme of processing ethics violations under the State Ethics Act into three distinct steps: (1) receiving the complaint, (2) handling and investigating the complaint under the statutory process, and (3) resolving the complaint.¹⁴³ Because the statutory scheme contemplates all three steps, the supreme court held that the General Assembly “intended the respective Ethics Committees to have exclusive authority to hear the alleged ethics violations of its own members and staff.”¹⁴⁴ In an attempt to further support this holding, the court later brought up article III, section 12, in which the court implied that the General Assembly’s “punish[ing] [of] its own members for disorderly behavior” includes the statutorily granted power to punish under the State Ethics Act.¹⁴⁵ The action of actually punishing members of the General Assembly appears to fall under the third step in the statutory scheme, concerning resolution of the complaint.¹⁴⁶ Thus, the first two outcomes presented above arise out of the creation of a jurisdictional line between the second and third step in the statutory scheme of handling ethics complaints.¹⁴⁷ Without the jurisdictional line, one of the legislative entities—the House or Senate Ethics Committee—must handle the entire process.¹⁴⁸ Alternatively, if the line is drawn, a separate entity—the State Ethics Commission—could possibly handle receiving the complaint and conducting the investigation and hearing, but then pass along the complaint to the legislative committee to handle the punitive resolution step. The latter solution allows independent ethics oversight without depriving the General Assembly of its constitutional right to punish its members for disorderly behavior.¹⁴⁹ This outcome also appears consistent with the court’s holding in *Rainey* because it maintains the General Assembly’s sole authority over the conduct of its own members and, thus, preserves the separation of powers.¹⁵⁰

The third outcome assumes that the scope of *disorderly behavior* does not include ethical misconduct. Thus, an independent entity—such as the State

142. This line of reasoning stems from *Rainey*, although the court did not directly address the State Ethics Commission’s jurisdiction there. See *Rainey*, 404 S.C. at 326–27, 745 S.E.2d at 84.

143. See *id.* at 325, 745 S.E.2d at 83.

144. *Id.*

145. *Id.* at 326, 745 S.E.2d at 84.

146. See S.C. CODE ANN. § 8-13-540(3)(a)–(d) (codifying the alternative actions the ethics committee shall take after hearing an ethics complaint and determining its findings of fact). As these options appear to be the only solution after hearing a complaint, it seems logical that they constitute the act of punishing. See WEBSTER’S UNABRIDGED DICTIONARY 1567 (Random House, 2d ed. 2001) (defining *punish* as “inflict[ing] a penalty for (an offense, fault, etc.)”).

147. See discussion *supra* Part III.B (discussing the court’s division of the statutory scheme of handling ethics violations under the State Ethics Act).

148. See *Rainey*, 404 S.C. at 324, 745 S.E.2d at 83.

149. See generally S.C. CONST. art. III, § 12 (bestowing the constitutional power to punish members for disorderly behavior on each house of the South Carolina General Assembly); S.C. CONST. art. I, § 8 (creating South Carolina’s separation of powers doctrine).

150. See *Rainey*, 404 S.C. at 326, 745 S.E.2d at 84–85.

Ethics Commission—could arguably exercise jurisdiction over the entire process of handling ethics violations of any public official, including legislators. Under this outcome, and in line with the Reform Commission’s report, the General Assembly could simply amend the State Ethics Act to grant jurisdiction to the State Ethics Commission in an effort to provide “extra-legislative ethics oversight.”¹⁵¹ That being said, this third outcome may conflict with the *Rainey* opinion.¹⁵² As previously discussed in this Note, the court undoubtedly implied that the scope of *disorderly behavior* under article III, section 12—in some capacity not defined—reaches ethics violations under the State Ethics Act.¹⁵³ Thus, under *Rainey*, the General Assembly likely cannot delegate the *entire* process of handling ethics violations because article III, section 12 apparently grants some rights exclusively to the General Assembly.¹⁵⁴

Nevertheless, because the court in *Rainey* did not explicitly define *disorderly behavior*, the following discussion looks to several cases from other jurisdictions to better understand this term of art.

A. Guidance on Defining Disorderly Behavior

Unlike the South Carolina Supreme Court in *Rainey v. Haley*, the Reform Commission attempted to find some guidance from other jurisdictions on the definition of *disorderly behavior*.¹⁵⁵ In its report, the Reform Commission looked to *State v. Gregorio*,¹⁵⁶ a New Jersey case that “addresse[d] issues raised by non-legislative prosecution of ethics violations [of a state senator] as possible violations of the separation of powers doctrine and legislative rule-making authority.”¹⁵⁷ In that case, the defendant allegedly failed to report certain income

151. COMMISSION REPORT, *supra* note 7, at 30.

152. *See Rainey*, 404 S.C. at 326, 745 S.E.2d at 84–85.

153. *See supra* Part III.B. The concurrence in *Rainey*, however, did mention several bills that were introduced in the House and Senate last year to bring the General Assembly within the jurisdiction of the State Ethics Commission. *See Rainey*, 404 S.C. at 328 n.8, 745 S.E.2d at 85 n.8 (Hearn, J., concurring). Nevertheless, these bills did not make it out of the committee stages. *See* COMMISSION REPORT, *supra* note 7, at 30 (citing H.B. 4421 (S.C. 2012) and S.B. 1373 (S.C. 2012)).

154. *See Rainey*, 404 S.C. at 326, 745 S.E.2d at 84–85.

155. *See* COMMISSION REPORT, *supra* note 7, at 29.

156. 451 A.2d 980 (N.J. Super. Ct. Law Div. 1982).

157. COMMISSION REPORT, *supra* note 7, at 30 (citing *Gregorio*, 451 A.2d 980). In its report, the Reform Commission approached this case to better define *disorderly behavior*, but also in a broader context to suggest that the judiciary has jurisdiction over ethics violations—contrary to the holding in *Rainey v. Haley*, which came out after the Reform Commission’s report. *Compare id.* at 30–31 (citations omitted) (rejecting the argument that the executive branch has no power to enforce a rule requiring financial disclosure statements), *with Rainey*, 404 S.C. at 327, 745 S.E.2d at 84 (holding that “ethics investigations regarding legislative members and staff can only be performed by the [General Assembly]”). However, this Note is solely focused on defining *disorderly behavior* in regard to the constitutionality of an independent ethics commission—and examines *Gregorio* in that specific context.

in a filing required under New Jersey's conflict of interest law,¹⁵⁸ an ethics violation similar in nature to a violation under the South Carolina State Ethics Act.¹⁵⁹ However, unlike South Carolina, New Jersey has a single independent ethics commission—the Joint Legislative Committee on Ethical Standards—which functions under the executive branch and has statutorily granted jurisdiction over the legislature.¹⁶⁰ The defendant argued that this executive branch oversight and subsequent prosecution in state court violated the state's separation of powers doctrine.¹⁶¹ New Jersey's separation of powers doctrine is very similar to that found in the South Carolina constitution.¹⁶² New Jersey's doctrine states that “[t]he powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.”¹⁶³ Likewise, according to South Carolina's doctrine, “In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.”¹⁶⁴

The New Jersey court dismissed the defendant's argument, reasoning that the separation of powers doctrine is not “to be construed as creating three mutually exclusive watertight compartments.”¹⁶⁵ To that end, “criminal prosecution in such a case plainly advances the legislative goal.”¹⁶⁶ The court compared such “concurrent jurisdiction” to the executive prosecution of an errant attorney, even though the exclusive authority to supervise and discipline attorneys rests with the New Jersey Supreme Court.¹⁶⁷ The court explained that “[t]o accept [the] defendant's theory, one must subscribe to the view that the Legislature intended to make its members super-citizens shielded from criminal

158. *Gregorio*, 451 A.2d at 982.

159. Compare N.J. STAT. ANN. § 2C:28-7 (enumerating state law regarding deceptive acts in manipulation of public records or information), with S.C. CODE ANN. §§ 8-13-1120 through -1520 (Supp. 2013) (enumerating South Carolina's State Ethics Act regarding election campaign management).

160. See N.J. STAT. ANN. § 52:13D-22.

161. *Gregorio*, 451 A.2d at 982.

162. Compare N.J. CONST. art. III, para. 1 (enumerating New Jersey's separation of powers doctrine), with S.C. CONST. art. I, § 8 (enumerating South Carolina's separation of powers doctrine).

163. N.J. CONST. art. III, para. 1.

164. S.C. CONST. art. I, § 8.

165. *Gregorio*, 451 A.2d at 984 (quoting *Masset Bldg. Co. v. Bennett*, 71 A.2d 327, 329 (1950)) (internal quotation marks omitted).

166. *Id.* That goal is “to combat official corruption and advance public confidence in its governmental institutions.” *Id.* at 983.

167. *Id.* at 984 (citing N.J. CONST. art. VI, § 2, para. 3 (1947)). This argument would be equally applicable in South Carolina because the situation is the same regarding attorney discipline. See S.C. APP. CT. R. 413.

prosecution by sheer virtue of their public office.”¹⁶⁸ The court finalized its dismissal of the defendant’s arguments by holding that “[t]he power of the Legislature to enforce its own code of ethics, to assess monetary penalties and to pursue further action, including expulsion of a member, does not divest the Executive Branch of the authority and obligation to prosecute criminal conduct.”¹⁶⁹ Further, such power cannot “be construed to encroach upon that sphere of responsibility constitutionally dedicated to the judiciary.”¹⁷⁰

Another possibly more important part of *Gregorio* addressed the New Jersey state legislature’s amicus curiae argument that “the requirement of financial disclosure statements constitutes a legislative rule beyond the power of the executive to enforce.”¹⁷¹ This argument relies on the fact that New Jersey’s ethics code was derived from constitutionally granted rulemaking authority; as such, only the legislature can enforce it.¹⁷² New Jersey’s constitutional provision states that “[e]ach house shall choose its own officers, determine the rules of its proceedings, and *punish its members for disorderly behavior*.”¹⁷³ The court rejected the amicus argument and summarized its holding as follows:

The short answer to the argument advanced by amicus is that the code of ethics and hence the requirement that financial disclosure statements be filed with the joint committee were adopted pursuant to the Conflicts of Interest Law, not by virtue of the constitutional authority of the Legislature to make rules and punish members for disorderly behavior. The constitutional rule-making power of the Legislature is generally exercised in the context of establishing standards to provide for the orderly and efficient conduct of legislative *proceedings*. The code of ethics provision requiring the filing of financial statements stands upon an entirely different footing [T]he Legislature made a clear procedural election when it adopted a code of ethics and characterized it as an agency rule. It cannot be said that the code was adopted pursuant to a power demonstrably committed to the Legislative Branch of government by the text of the Constitution. Simply stated, it was adopted pursuant to the Conflicts of Interest Law, not by virtue of a rule

168. *Gregorio*, 451 A.2d at 985 (stating further that “[i]n such a case, his activities would constitute a violation of the legislative code of ethics and, hence, criminal penalties would be barred”).

169. *Id.*

170. *Id.* (citing N.J. CONST. art. V, § 1, para. 1 (1947)).

171. *Id.* at 988.

172. *See id.* (citing N.J. CONST. art. IV, § 4, para. 3 (1947)).

173. N.J. CONST. art. IV, § 4, para. 3 (emphasis added). This provision is almost identical to South Carolina’s article III, section 12, which states that “[e]ach house shall choose its own officers, determine its rules of procedure, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same cause.” S.C. CONST. art. III, § 12.

promulgated pursuant to the constitutional responsibility of the Legislature to establish its own procedures.¹⁷⁴

The court's holding explicitly clarified that the purpose of the constitutional rulemaking provision is for the orderly and efficient conduct of legislative proceedings, and that it does not relate to enforcement of the state ethics code.¹⁷⁵ The South Carolina Reform Commission agreed with this contention by citing the New Jersey court's holding in its report.¹⁷⁶

*United States v. Rose*¹⁷⁷ provides further guidance in defining *disorderly behavior*.¹⁷⁸ In that case, a congressman was found to have violated the Ethics in Government Act of 1978¹⁷⁹ (the Federal Ethics Act) after being investigated by the U.S. House of Representatives Committee on Standards of Official Conduct.¹⁸⁰ The same Committee concluded the matter by issuing a public rebuke for the violations.¹⁸¹ Despite the Committee's conclusion, the Department of Justice (DOJ) opened an investigation to determine whether the congressman had "knowingly and willfully" violated the ethics law.¹⁸² Subsequent to the DOJ's action, the House Committee informed the DOJ that it had already concluded that the congressman did *not* knowingly and willfully violate the Federal Ethics Act.¹⁸³ The DOJ, however, proceeded with its action and this lawsuit ensued.¹⁸⁴ The portion of the opinion relevant to this Note discussed whether "the constitutional provision granting each House the power to regulate the conduct of its Members . . . bars the DOJ [under the separation of powers doctrine] from bringing an action charging 'knowing and willful violations' of the [Federal] Ethics Act after the Committee has determined that the violations were inadvertent."¹⁸⁵ Interestingly—and in contrast to South Carolina law—the U.S. House of Representatives took its ethics law further by adopting the full text of the Federal Ethics Act into the House Rules.¹⁸⁶ The D.C. Circuit held that this action allowed the House to enforce the Federal Ethics Act "pursuant to its

174. *Gregorio*, 451 A.2d at 988–89 (emphasis added) (citations omitted).

175. *See id.*

176. *See* COMMISSION REPORT, *supra* note 7, at 32.

177. 28 F.3d 181 (D.C. Cir. 1994).

178. *Id.* at 183–84 (citing H.R. REP. NO. 100-526, pt. VI, at 25 (1988)) (listing a Congressman's multiple violations of both the House Rules and the Ethics Act).

179. Pub. L. No. 95-521, 92 Stat. 1824 (1978).

180. *Rose*, 28 F.3d at 184 (citing H.R. REP. NO. 100-526, pt. VI, at 25).

181. *Id.* (citing H.R. REP. NO. 100-526, at 26).

182. *Id.*

183. *See id.*

184. *Id.* at 185.

185. *Id.* at 189–90 (citing U.S. CONST. art. I, § 5, cl. 2) ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.").

186. *Id.* at 190 (citing House Rule XLIV, H.R. Res. 1099, 90th Cong., 2d Sess., 114 CONG. REC. 8777 (1968)).

constitutional power to discipline its Members.”¹⁸⁷ Despite this further action by the House, however, the court still held that “by codifying these requirements in a statute, Congress has empowered the executive and judicial branches to enforce them; in bringing this action, then, the DOJ was fulfilling its constitutional responsibilities, not encroaching on Congress’s.”¹⁸⁸ Thus, the court stated that it “[did] not think the DOJ’s action against Congressman Rose offend[ed] the separation of powers doctrine.”¹⁸⁹

This holding is very pertinent to defining *disorderly behavior* because it seems to imply that, by incorporating the Federal Ethics Act into the House Rules, enforcement of that Act came within the scope of the House’s power to “punish its Members for disorderly Behavior” under Article I, Section 5, Clause 2 of the U.S. Constitution.¹⁹⁰ More importantly, however, the inclusion of the Federal Ethics Act into the House Rules did not bar concurrent executive enforcement of the Act because the Act was already codified prior to its incorporation into the House Rules.¹⁹¹

Lastly, the most important aspect of the D.C. Circuit’s holding in *Rose* is its implication that Article I, Section 5, Clause 2 of the U.S. Constitution—particularly *disorderly behavior*—refers only to the actual operation of the legislative proceedings.¹⁹² This proposition would support the South Carolina Reform Commission’s conclusion that the almost identical provision in the state constitution does not “contemplate a role for sanctioning conduct *not immediately threatening* to legislative proceedings.”¹⁹³ Only by incorporating the Federal Ethics Act into the House Rules did the U.S. House of Representatives bring ethics violations within its scope of power under the U.S. Constitution’s rulemaking provision.¹⁹⁴ Prior to such incorporation, ethics violations under the Federal Ethics Act were likely outside the scope of *disorderly behavior*.

Lastly, the *Commission on Ethics v. Hardy*¹⁹⁵ case presents yet another twist in the task of defining *disorderly behavior*. In *Hardy*, the Supreme Court of Nevada addressed an appeal for a permanent injunction after the Nevada Commission on Ethics instituted administrative proceedings against a state senator.¹⁹⁶ The proceedings followed a complaint of ethics violations that involved the senator’s failure to adequately disclose an alleged conflict of

187. *Id.* (referring to the “punish its Members for disorderly Behavior” provision in U.S. CONST. art. I, § 5, cl. 2).

188. *Id.*

189. *Id.*

190. *See id.*; *see also* U.S. CONST. art. I, § 5, cl. 2 (creating the constitutional power for each House of Congress to determine the “Rules of its Proceedings”).

191. *United States v. Rose*, 28 F.3d 181, 190 (D.C. Cir. 1994).

192. *See id.*

193. COMMISSION REPORT, *supra* note 7, at 29 (emphasis added).

194. *See Rose*, 28 F.3d at 190; U.S. CONST. art. I, § 5, cl. 2.

195. 212 P.3d 1098 (Nev. 2009).

196. *Id.* at 1102.

interest regarding a senate bill, as well as his failure to abstain from the voting on that bill.¹⁹⁷ Particularly, the court considered whether such a proceeding violated the Nevada separation of powers doctrine by delegating a constitutionally committed function of the legislature to another branch of government.¹⁹⁸ The court began its discussion by reviewing Nevada's separation of powers doctrine, which prohibits one branch of government from impinging on the powers of another.¹⁹⁹ Next, the court considered article 4, section 6 of the Nevada constitution:

Each House shall judge of the qualifications, elections and returns of its own members, choose its own officers (except the President of the Senate), determine the rules of its proceedings and may punish its members for disorderly conduct, and with the concurrence of two thirds of all the members elected, expel a member.²⁰⁰

The court stated that "[t]his provision expressly grants the authority to discipline legislators for disorderly conduct to the individual houses of the Legislature, thus the power to discipline legislators for disorderly conduct is a function constitutionally committed to each house of the Legislature."²⁰¹ Further, "the Legislature may not delegate th[is] constitutionally committed authority."²⁰² This conclusion left the court to decide "[w]hat legislative actions are subject to discipline for disorderly conduct under this constitutional provision," and particularly, whether the power to discipline for disorderly conduct applied to the senator's ethics violations.²⁰³ Addressing these issues, the court reached the following conclusion:

[T]o the extent that a legislator's actions are undertaken in the course of the legislator's participation in, or conduct of, *a core legislative function*, any discipline for purported disorderly conduct in the course of engaging in these core function activities is a function constitutionally

197. *Id.*

198. *Id.* at 1100. In particular, the court determined that the Nevada Commission on Ethics is an executive branch agency and, thus, part of another branch of government that is separate from the legislature. *Id.* at 1108.

199. *Id.* at 1103–04 (citing *Heller v. Legislature*, 93 P.3d 746, 753 (Nev. 2004)). Specifically, article 3, section 1(1) of the Nevada constitution states the following:

The powers of the Government of the State of Nevada shall be divided into three separate departments, . . . the Legislative, . . . the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

NEV. CONST. art. III, § 1.

200. NEV. CONST. art. IV, § 6.

201. *Hardy*, 212 P.3d at 1104.

202. *Id.* at 1105.

203. *Id.* (citing NEV. CONST. art. IV, § 6).

committed to each legislative house with regard to its members that cannot be delegated to another branch of government.²⁰⁴

The court was quick to note that the legislature can delegate the power to discipline conduct related to *noncore* legislative functions.²⁰⁵ In this case, however, the court held that voting on legislation is a core legislative function.²⁰⁶ As such, “the authority to discipline legislators for disorderly conduct allegedly committed in the course of voting on legislation . . . cannot be delegated to another branch of the government.”²⁰⁷ The rule from *Hardy* is relatively expansive in the sense that the punishment of any disorderly conduct related to the core function activities, such as the disclosure necessary to vote or abstain from voting on legislation, cannot be delegated to another branch of government.²⁰⁸

The decision in *Hardy* likely creates another step of analysis when considering what constitutes *disorderly behavior*: determining whether the misconduct was undertaken in the course of a “core legislative function.”²⁰⁹ If so, under *Hardy*, any punishment for that misconduct falls within the category of a “function constitutionally committed to each house of the Legislature [that] cannot be delegated to another branch of government.”²¹⁰ This rule would disrupt the South Carolina Reform Commission’s conclusion that article III, section 12 of the South Carolina constitution only deals with conduct linked to the actual operation of legislative proceedings.²¹¹ Instead, in determining whether conduct falls under the protection of article III, section 12, one would have to first determine whether such conduct relates to a “core legislative function.”²¹² If so, only the South Carolina General Assembly would have the constitutional power to punish its members for such conduct.²¹³

204. *Id.* at 1106 (emphasis added) (citing *Brady v. Dean*, 790 A.2d 428, 431–33 (Vt. 2001)).

205. *See id.* at 1106 n.9 (emphasis added). The court expanded on this by stating, “Using the ethics laws as an example, such proceedings could include discipline for legislators who use governmental time, property, equipment, or other facilities for nongovernmental purposes (NRS 281A.400(8)), bid or enter into governmental contracts (NRS 281A.430), or accept or receive an honorarium (NRS 281A.510).” *Id.*

206. *Id.* at 1106.

207. *Id.*

208. *See id.* at 1107 (citing *Heller v. Legislature*, 93 P.3d 746, 753 (Nev. 2004); *Brady v. Dean*, 790 A.2d 428, 431–33 (Vt. 2001)).

209. *See id.* at 1106 (citing *Brady*, 790 A.2d at 431–33 (Vt. 2001)).

210. *Id.* (citing *Brady*, 790 A.2d at 432 (Vt. 2001)). This, of course, assumes that the state in which such analysis is taking place has a similar constitutional provision to those in Nevada and South Carolina dealing with the “punishment of disorderly behavior.” *See* NEV. CONST. art. IV, § 6; S.C. CONST. art. III, § 12.

211. COMMISSION REPORT, *supra* note 7, at 29.

212. *See Hardy*, 212 P.3d at 1106.

213. *See* S.C. CONST. art. III, § 12.

VI. CONCLUSIONS IN LIGHT OF *RAINEY V. HALEY*

South Carolina is bound by the court's ruling in *Rainey*.²¹⁴ Thus, the resolution—or punishment—of ethics violations under the State Ethics Act appears to currently fall within the General Assembly's exclusive jurisdiction.²¹⁵ The *Rainey* court, however, did not explicitly define *disorderly behavior* and only implied that punishing members of the General Assembly for disorderly behavior includes the resolution of ethics violations.²¹⁶ Accordingly, the conclusions reached by the South Carolina Ethics Reform Commission are not entirely invalid. The Reform Commission made a useful observation: the South Carolina Code clearly states that jurisdiction can be granted to the State Ethics Commission if the House or Senate rules are amended.²¹⁷ Also, and perhaps more importantly, the notion that *disorderly behavior* only refers to conduct affecting legislative *proceedings* may be found in case law outside of appendix 2 in the Reform Commission's report.²¹⁸ The *Gregorio* and *Rose* cases support the idea that conduct not immediately threatening to a legislative function—such as ethics violations under the State Ethics Act—does not fall within the scope of *disorderly behavior*.²¹⁹ The *Hardy* case also provides support for the distinction between conduct that is immediately threatening and conduct that is not—but analyzes the issue from the perspective of whether the conduct affects a core legislative function.²²⁰

Going forward, the South Carolina Supreme Court may need to reconsider its ruling in *Rainey* and more clearly explain its interpretation of *disorderly behavior*.²²¹ The cases discussed above, however, provide keen insight into how other courts have dealt with the issue of whether *disorderly behavior* includes ethics violations.²²² If the South Carolina General Assembly adopts the State

214. See *Rainey v. Haley*, 404 S.C. 320, 326–27 745 S.E.2d 81, 84 (2013) (holding that to give any entity besides the House and Senate Ethics Committees the power to punish legislative members for ethics violations would violate the separation of powers by depriving the General Assembly of its right to “punish its members for disorderly behavior”).

215. *Id.* at 326, 745 S.E.2d at 84–85 (citations omitted).

216. *Id.* at 326, 745 S.E.2d at 84.

217. See COMMISSION REPORT, *supra* note 7, at 29 (“[T]o initiate or receive complaints and make investigations . . . of an alleged violation . . . by a public official, public member, or public employee except members or staff, including staff elected to serve as officers of or candidates for the General Assembly unless otherwise provided for under House or Senate rules.” (emphasis added) (quoting S.C. CODE ANN. § 8-13-320(9) (Supp. 2013))).

218. See, e.g., *United States v. Rose*, 28 F.3d 181, 183 (D.C. Cir. 1994) (discussing the notion that disorderly behavior only refers to conduct affecting legislative proceedings); *Comm’n on Ethics v. Hardy*, 212 P.3d 1098, 1106 (Nev. 2009) (citing *Brady v. Dean*, 790 A.2d 428, 432 (Vt. 2001)) (discussing the notion that disorderly behavior only refers to conduct affecting legislative proceedings); *State v. Gregorio*, 451 A.2d 980, 989 (N.J. Super. Ct. Law Div. 1982) (discussing the notion that disorderly behavior only refers to conduct affecting legislative proceedings).

219. See *Gregorio*, 451 A.2d at 989; *Rose*, 28 F.3d at 190.

220. See *Hardy*, 212 P.3d at 1106 (citing *Brady*, 790 A.2d at 432–33 (Vt. 2001)).

221. See *Rainey v. Haley*, 404 S.C. 320, 327 745 S.E.2d 81, 84–85 (2013).

222. See *supra* Part V.A.

Ethics Act into its rules of proceedings, then *disorderly behavior* would include any violations under the Act.²²³ Alternatively, perhaps only punishment for violations involving core legislative functions—such as voting on bills—will come under the exclusive jurisdiction of the General Assembly granted by article III, section 12.²²⁴

If the goal is truly to restore trust in government, then South Carolina must find a solution to provide more independent oversight of the ethics laws enforced against state legislators. The most viable option would likely involve a situation in which an independent entity—the State Ethics Commission—can receive ethics complaints and handle investigations and factfinding, while either the House or Senate Ethics Committee would then resolve the complaints and punish the respondents accordingly.²²⁵ This solution draws a jurisdictional line that preserves the constitutional right of the General Assembly to punish its own members for ethics violations, but also creates a system of independent oversight that instills more trust in the state's public officials.²²⁶ Regardless, after the *Rainey* decision, the implementation of this solution will require further clarification from the South Carolina Supreme Court on the concept of disorderly behavior. Only then can South Carolina move forward and restore trust in its government.

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223. See, e.g., *Rose*, 28 F.3d at 183 (holding that adopting the Federal Ethics Act into the U.S. House Rules allowed the House to enforce the Federal Ethics Act “pursuant to its constitutional power to discipline its Members”).

224. See, e.g., *Hardy*, 212 P.3d at 1106 (citing *Brady*, 790 A.2d at 432–33) (holding that punishment of any disorderly conduct related to the core function activities of the legislature cannot be delegated to another branch of the government).

225. See *supra* Part V.

226. See *supra* Part V.